

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
ATLANTA BRANCH OFFICE

LANSING-LOUISIANA, LLC

and

CASE 15–CA–117585

MICHAEL MERRITT, an Individual

*Charles R. Rogers, Esq.,*  
for the General Counsel.  
*Robert D. Overman, Esq.*  
*(Stinson Leonard Street LLP),*  
for the Respondent.

DECISION

STATEMENT OF THE CASE

**ROBERT A. RINGLER, Administrative Law Judge.** On May 5 and 6, 2014, this case was heard in Monroe, Louisiana. The complaint alleged that Lansing-Louisiana, LLC (Lansing-Louisiana or the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by firing Michael Merritt as a result of his protected concerted activities. On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT<sup>1</sup>

I. JURISDICTION

At all material times, Lansing-Louisiana, a limited liability company, with a facility in Delhi, Louisiana (the mill), has been a grain merchandiser. Annually, it directly sells and ships goods exceeding \$50,000 in value outside of Louisiana. Based upon the foregoing, I find that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act.

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<sup>1</sup> Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations, and uncontroverted testimony.

## II. ALLEGED UNFAIR LABOR PRACTICE

### A. Introduction

Lansing-Louisiana, a wholly-owned subsidiary of Lansing Trade Group, LLC (Lansing Trade), receives grain from farmers, which it then stores, processes and redistributes to its customers. Its operations peak during harvest season, which runs from July to October. During harvest season, it supplements its workforce with seasonal employees and requires extensive overtime from its permanent complement.

### B. Merritt's Tenure

Merritt, who began as a seasonal worker, was retained as a permanent control booth operator in January 2011. In this capacity, he ran a computerized system, which distributed grain within the mill via a complex chute and conveyor system.<sup>2</sup> His performance reviews were steady, and he received “meets expectations” ratings on his 2011 and 2012 appraisals. (R. Exhs. 1–2). He was directly supervised by Plant Supervisor Danny Ray York, while Location Manager Brad Terral was his second-level supervisor. During his tenure, he repeatedly complained to Lansing Trade and Lansing-Louisiana about York. His complaints focused upon York’s alleged dishonesty, incompetence, bigotry, hostility, negligence and job abandonment. These complaints persisted for almost a year, and were collective and individualized in nature.

#### 1. August 2012 Communications

On August 20, 2012, Merritt telephoned Michelle Golloher, Human Resources Manager at Lansing Trade, and lamented about York and other matters.<sup>3</sup> (R. Exh. 10). Regarding York, he complained that:

90% of the time he’s not here. . . . I run the place. . . . [H]e likes yelling at folks . . . . I just want to let someone know before I leave . . . .

(R. Exh. 4) (transcript); R. Exh. 3 (Golloher’s recording).<sup>4</sup> He also complained about a disheartening racial incident, which involved a contractor’s employee tossing a noose at Demarcus Dykes, an African-American worker employed by Lansing-Louisiana.<sup>5</sup>

<sup>2</sup> He was paid \$13.75 per hour, which was the second highest rate paid to an hourly worker.

<sup>3</sup> See also (GC Exh. 2) (additional emails from Merritt to Golloher concerning his grievances).

<sup>4</sup> R. Exhs. 3 and 4, which were conditionally admitted into evidence at the hearing, are hereby admitted.

<sup>5</sup> In early 2012, Jerry Carter, a CPS Company employee threw a noose at Dykes. Dykes stated that he caught the noose and no words passed. He added that he reported this incident to Terral, who gave him the option of letting the issue rest or having him complain to CPS Company. Dykes and Terral credibly related that he opted to let the issue rest. There is no evidence that Dykes or any others have since experienced harassment connected to CPS Company. Respondent, through Terral, Golloher, Lebofsky and Pflipsen, credibly established that it thoroughly investigated this matter, which it deemed to be isolated and resolved. Its response was somewhat stifled because a contractor’s employee committed the underlying misconduct.

## 2. July 2013<sup>6</sup> Communications

On July 16, Merritt sent this email to Golloher concerning his employment:

Brad offered to lay me off, Ray has told other employees he doesn't trust me . . . . I am being alienated by upper management here since my divulgence of information deemed mutinous . . . . They have treated me with disdain and animosity and . . . **I am actively trying to locate other job opportunities.** . . .

(R. Exh. 11) (emphasis added).<sup>7</sup>

On July 18, Merritt emailed Dwight Pflipsen, Vice President at Lansing Trade, about his workplace concerns. (R. Exh. 26). Later that day, Merritt sent a follow-up email, which again warned that he was “actively pursuing other job opportunities.” (R. Exh. 19).

On July 19, Pflipsen telephoned Merritt; he recounted him repeating his concerns about York and the Dykes incident. (Tr. 348-49; R. Exh. 28). He recollected him continuing to threaten resignation and stating, “I have another job. I’m going to quit.” (Id.). They also scheduled an in-person meeting for the next week concerning Merritt’s grievances.

On July 22, Merritt emailed Pflipsen, and repeated his intention to resign:

I found out . . . that Ray plans to fire me after harvest . . . . **I have decided to give Ray my two weeks notice and move on to a job where at the very least I will be treated with dignity.** I have not told him yet, but plan to do so this week when I know my new job is secure. . . . To be clear this is not a threat . . . .

(R. Exh. 27) (emphasis added). On the same date, Pflipsen tried to dissuade Merritt from resigning before Lansing Trade finalized its investigation. His email stated:

**The organization takes these complaints seriously** and Melinda Lebofsky, director of HR, . . . is looking into your situation and investigating. She will be getting back to you shortly. **Certainly Lansing cannot prohibit you from resigning, and we are hoping you will give Lansing a chance to reply.**

(Id.) (emphasis added). Merritt pessimistically replied, “I’m at the end of my rope [and] . . . don’t have a lot of faith in . . . my coworkers.” Later that day, however, he softened his stance on immediate resignation and emailed that he might now opt to stay “through harvest.” (Id.).

## 3. July 25 Meeting

Merritt met with Lebofsky and Pflipsen at the mill. Lebofsky credibly testified that he first reiterated his concerns about York and the Dykes incident. She recollected him then

<sup>6</sup> All dates herein are in 2013, unless otherwise stated.

<sup>7</sup> On July 18, Merritt and Lebofsky also spoke on the telephone regarding his grievances. Lebofsky testified that Merritt stated that he could no longer tolerate working at the mill, and intended to look for another job.

announcing that:

I'm done. I quit. . . . I'm sick of it. I resign. I have another job. . . . My time  
here is through. I'm done. You all aren't running the show. Brad is a good man  
5 . . . but I quit. . . . Sorry, it's come to this.

(Tr. 375-76). She related that, thereafter, he collected his belongings and vacated the mill. See  
(R. Exh. 29) (her contemporaneous notes). Pflipsen credibly corroborated her account.

10 Later that evening, Merritt sent the following email to Lebofsky, which memorialized his  
earlier resignation:

I was experiencing major anxiety and . . . had no grasp of the weight of me  
resigning . . . . I wish Lansing had more value over morality than money.

15 (R. Exh. 34). His e-mail conspicuously failed to cite any desire to rescind his resignation, or  
clarify any misunderstanding concerning his intention to voluntarily end his tenure.

20 On July 26, Lebofsky sent this e-mail to Merritt, which affirmed Respondent's  
acceptance of his resignation:

During our meeting . . . you stated on a minimum of four occasions:

1. "I'm done, I quit."
- 25 2. "I'm sick of it, I resign."
3. "I have another job."
4. "My time here is through, I'm done."

30 In consideration of the statements you made above, the organization felt like the  
relationship between you and the company was too damaged to be repaired.  
Further, it was most likely in everyone's best interest to accept your resignation.

35 (Id.). Terral credibly stated that he had never planned to fire Merritt. Lebofsky and Pflipsen  
credibly added that they were unauthorized to fire him at the July 25 meeting, and could not have  
done so without authorization.

#### 4. Merritt's Position

40 Merritt denied quitting during portions of his testimony. He denied stating, "I'm sick of  
it," "I resign," "my time here is through," "I'm done," or using words to that effect. (Tr. 82).  
He contradictorily stated, however, that:

They said we will accept your resignation immediately. And I didn't realize me  
turning around and walking out of the room would activate that . . . .

45 (Tr. 148-49). He also conceded that he was never directly told that he was fired. He similarly  
could not explain why, if there was such a dramatic misunderstanding concerning his

resignation, he failed to protest and remain at the mill, until this alleged confusion was resolved. He similarly neglected to explain why he never attempted to rescind the resignation that prompted this reported confusion.

## 5. Credibility Resolution

Given that Merritt insisted that he was discharged, and Lebofsky and Pflipsen each testified that he resigned, I must make a credibility resolution. For several reasons, I credit Lebofsky and Pflipsen on this seminal point, and find that he voluntarily quit. First, they were highly credible witnesses, with stellar demeanors. Their testimony was corroborated by contemporaneous notes and other documentary evidence, including Merritt's own correspondence, which memorialized his resignation. See (R. Exh. 34). Second, I find that Merritt's pre-resignation e-mails, which all cited his intention to resign, were consistent with his ultimate resignation. See (R. Exh. 27). Third, Merritt was an inconsistent witness, who often contradicted his own testimony and appeared to pause, when answering tougher queries. He contradictorily conceded that he might have resigned, but, then unbelievably claimed that he did not understand what he was doing. See (Tr. 148-49). Fourth, it is implausible that Merritt, who was highly assertive in advancing his complaints about York during his tenure, would have failed to vociferously and immediately protest any misunderstanding concerning his resignation. Finally, if Lansing-Louisiana had actually sought to fire Merritt and craft a hoax about his resignation, Pflipsen never would have tried to persuade him in his July 22 email to not resign, until the investigation concerning his complaints was first concluded. Moreover, Lebofsky and Pflipsen would not have undergone the charade of flying to the mill and personally meeting with him and several other employees regarding his complaints, if they solely sought to fire him. In sum, the record convincingly demonstrates that Merritt voluntarily resigned.

## III. ANALYSIS

The General Counsel failed to establish that Merritt was discharged, in violation of Section 8(a)(1).<sup>8</sup> As explained above, the record convincingly shows that he voluntarily resigned from his position.<sup>9</sup>

<sup>8</sup> The Complaint and unfair labor practice charge expressly allege that Merritt was fired, and clearly do not advance a constructive discharge theory. See (GC Exh. 1). In his opening, counsel for the General Counsel consistently posited that, "Merritt never resigned, and the Employer . . . took his comments . . . as a pretext to get rid of him." (Tr. 8-9). He then restated his constant stance on this point at the end of the first hearing day. (Tr. 154). Finally, even assuming arguendo that a constructive discharge theory had been advanced, the record fails to adduce that intolerable working conditions caused Merritt's resignation. *Grocers Supply Co.*, 294 NLRB 438, 439 (1989).

<sup>9</sup> The General Counsel has similarly not alleged that, or litigated whether, Lansing-Louisiana unlawfully discriminated against Merritt by refusing to permit him to revoke his resignation. See *Star Trek, the Experience*, 334 NLRB 246, 247-248 (2001). In such cases, an employer can defend its refusal to accept a rescinded resignation, where it has hired a replacement or holds another non-discriminatory reason. (Id.). In the instant case, however, where the General Counsel has not advanced or litigated this theory, it would be improper to amend this allegation into the complaint sua sponte. See *Airborne Freight Corp.*, 343 NLRB 580, 581 (2004) (an unpled matter can support an unfair labor practice finding, where it is closely connected to the complaint's subject matter and *has been fully litigated*).

**CONCLUSIONS OF LAW**

1. Lansing-Louisiana is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Lansing-Louisiana did not violate Section 8(a)(1) by terminating Merritt, in response to his protected concerted activities.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>10</sup>

**ORDER**

The complaint is, accordingly, dismissed.

Dated Washington, D.C., July 25, 2014.

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**Robert A. Ringler**  
**Administrative Law Judge**

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<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.